IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 13TH DAY OF OCTOBER 2015/21ST ASWINA, 1937

CRL.A.No. 1284 of 2006

AGAINST THE JUDGMENT IN CC 206/2001 of J.M.F.C., VAIKOM.

PETITIONER/COMPLAINANT:

T.D.PURUSHAN, S/O.DAMODARAN,
THOTTUCHIRAYIL VEEDU, THALAYAZHAM KARA,
THALAYAZHAM VILLAGE, VAIKOM TALUK,
KOTTAYAM DISTRICT.

BY ADVS.SRI.P.K.MURALEEDHARAN
SRI.P.M.NATESAN

RESPONDENT(S)/ACCUSED AND STATE:
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1. C.GOPAKUMAR, S/O.CHANDRAN,
   THARAYIL HOUSE, THOTTUVAKKOM BHAGAM,
   VAIKOM TALUK,
   KOTTAYAM DISTRICT.

2. STATE OF KERALA,
   REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
   ERNAKULAM.

R1 BY ADV. SRI.SURIN GEORGE IPE
R2 BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 1284 of 2006

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Dated this the 13th day of October, 2015.

JUDGMENT

The appellant sought to prosecute the respondent for the offence under Section 138 of the Negotiable Instruments Act. After trial the accused was acquitted. The aggrieved complainant comes up in appeal.

2. According to the complainant, on 6.7.2000, the accused approached him and borrowed an amount of Rs.80,000/-. To discharge the said debt, the accused is said to have issued Ext.P1 cheque dated 6.10.2000. The cheque on presentation bounced for want of funds. The statutory notice invoked no response. Since the amount remained unpaid, the complainant was constrained to lay the complaint.

3. Cognizance of the offence was taken and after following the necessary procedures, summons was issued to the accused. On appearance of the accused, particulars of the offence were read out to him, to which he pleaded not guilty.

The complainant examined himself as P.W.1 and two other witnesses were also examined as P.Ws. 2 and 3 and had Exts. P1 to P6 marked. After the complainant's evidence, the accused was questioned under Section 313 Cr.P.C. wherein he denied the transaction. He added that he was a business man by profession at Ullala and he was a member of the Welfare Society of the Thulayazham Panchayat Merchant's Association . He had subscribed to a chitty run by the Welfare Society and at the time of receiving the chit amount, he issued two blank cheques. He defaulted in payment of the instalment and according to the accused, the complainant was the collection agent of the society and he had utilized one of the blank cheques and instituted proceedings against him. According to the accused, using the blank cheque of his brother, a person by name Shaji has given another complaint. The accused denied having borrowed any amount from the complainant. It is pointed out by him that three cases with regard to the three cheques, namely, two cheques given by him and the blank cheque of his brother given by him, resulted in three separate complaints, all by the office bearers of the Welfare Society. The accused examined D.Ws.1 to 3 and had Exts.D1 to D9 marked. The lower court on appreciation of the evidence found that the complainant was unable to establish the existence of a debt and also that Ext.P1 cheque was issued in discharge of a debt. The court found that the case put forward by the accused is more probable and hence he was acquitted.

4. Assailing the acquittal, learned counsel for the appellant contended that the court below has conveniently omitted to note the presumption available under Sections 118 and 139 of the Negotiable Instruments Act. The signature on the cheque is admitted and if that be so, it is for the accused to show under what circumstance it was issued. The plea put forward by the accused that the complainant in this case is the

collection agent of the Welfare Society is belied by the evidence of D.W.2. If that be so, the entire case built up by the accused falls to the ground. The mere fact that another complaint has been laid allegedly using the cheque of the brother of the accused in this case does not have any impact on the present complaint. According to the learned counsel for the appellant, the accused was unable to produce any document to show that he had occasion to issue blank cheques to the Society which, as he now alleged, have been misused by the Society. According to him, there has not been a proper appreciation of the evidence in the case and therefore acquittal cannot be sustained.

5. Learned counsel appearing for the respondent tried to support the finding of the court below. According to him, the evidence of P.W.3 and D.W.2 are sufficient to show the hollowness of the complaint. Even assuming that the complainant was not the collection agent as claimed by him,

things does not make better for the complainant. The accused had a definite case that the cheque in question was a blank cheque issued to the Society at the time when he bid the chit amount as security. To establish the said fact, learned counsel pointed out that he had summoned D.W.2 to produce the relevant documents and quite strangely, according to the learned counsel, he came forward with an explanation that all the documents were destroyed as per the decision taken by the General Body of the Society. It is also interesting to note, according to the learned counsel, that P.W.3 had laid a complaint using the cheque of the brother of the accused on the same day and that would probabilize the case put forward by the accused.

6. Learned counsel for the respondent pointed out that the court below has appreciated the evidence in considerable detail and has come to the conclusion that the complainant has failed to prove an existing debt and that for

the discharge of which Ext.P1 cheque has been issued. It is essentially a finding of fact based on appreciation of evidence. Unless it is shown that the findings are perverse or irrelevant aspects have been taken into consideration, even assuming that a different view is possible, this Court may not interfere with the order of acquittal passed by the court below.

7. Before embarking upon an examination of the evidence in the case, it will be useful to understand the scope of power of this Court in an appeal against an order of acquittal. Of course, this Court has ample powers to reverse a finding. But, normally, two presumptions operate in favour of the accused in a case of acquittal and the burden of rebutting other than the two presumptions is heavy on the appellant. Unless it is shown that the findings are so perverse that no reasonable man would come to such a conclusion, even assuming a different view is possible, it is well settled that benefit of acquittal which the trial court has extended to the

accused should be retained.

8. As rightly pointed out by the learned counsel for the appellant, signature in Ext.P1 cheque is admitted. However, the plea that the moment the signature is accepted, presumption under Sections 118 and 139 of the Negotiable Instruments Act is attracted may not be supported by the recent decisions of this Court. When one reads Section 139 of the N.I. Act, it refers to a cheque of the nature as mentioned in Section 138 of the N.I.Act. Section 138 of the N.I. Act speaks about a cheque which is issued for discharge of a debt. Therefore, two things will have to be proved, (1) the existence of an enforceable debt and (2) the cheque was issued in discharge of a debt. When these two ingredients are prima facie established, the burden shifts to the accused in view of the presumption available under Sections 118 and 139 of the N.I. Act. Here one has to remember that the burden of proof in the case of an accused is far far less in degree than on the

prosecution. Mere preponderance of probabilty was that creation of a doubt in the mind of court is sufficient in law.

9. All that is stated by the complainant in the complaint is that the accused was a friend and had close acquaintance with him and he borrowed a sum of Rs.80,000/-. However, in the affidavit in chief in lieu of chief examination, it was mentioned by the complainant that the borrowel was through one Shaji, who was examined as P.W.3. Further, at the time of evidence, the complainant came forward with a case that P.W.2 had occasion to come along with the accused to pray for time to pay the amount. This version given at the time of evidence is conspicuously absent in the complaint.

10. In the light of the absence of these crucial aspects in the complaint, one is in no doubt that P.Ws. 2 and 3 are planted witnesses as a result of after thought.

11. In order to establish the fact that the cheque in question was issued as a blank cheque to the Society with which the accused had a chitty transaction, he had summoned D.W.2 to produce certain documents. D.W.2 who was an office bearer of the Merchant's Society who admittedly run chitty business brought only the trust deed and stated that all other documents have been destroyed as a result of the decision taken by the General Body. The court below was inclined to accept that submission and was of the view that it was a deliberate act on the part of D.W.2 to conceal the true facts and state of affairs.

12. That Merchant's Society had earlier run a chitty was clear as is seen from Ext.D1. Clause 32 of the trust deed is of some relevance in this context, wherein it is stated that the assets and liabilities of the erstwhile Society were taken over by the trust. If that be so, it is difficult to accept the statement of D.W.2 that the documents maintained by the

Society can be destroyed as a result of the decision taken in the General Body. The court below was therefore perfectly justified in doubting the version given by D.W.2 in this regard.

13. True, the accused kept quite when he received notice. That probably was the first occasion for him to assert that he had not borrowed any amount from the complainant. But, by now, it is well settled that the fact that no reply has been sent does not result in an admission of the debt. The burden to prove the existence of a debt and issuance of a cheque still remains on the complainant. That is not discarded by the fact that no reply has been sent by the accused.

14. It is significant to notice that P.Ws. 2, 3 and D.W.2 were office bearers of the Society and it is also interesting to note that P.W.3 had instituted a complaint against the brother of the accused in this case. One must remember that the accused had a case that at the time of

receiving the chit amount, he had given two of his cheques and one blank cheque of his brother.

15. The accused had a case that the Society, after being converted into trust, misused the cheque so given by him and it is in order to establish that fact that D.W.2 was called upon to produce the relevant documents. The accused had taken care to produce documents to show that the claim made by D.W.2 regarding the destroyal of the documents may not be acceptable.

16. True, D.W.2 has stated that it was one E.D. Purushan who was the collection agent and not the complainant in this case. It is also true that the accused had a case that it was the complainant who was the collection agent. Whatever that be, the consistent case of the accused is that the cheque which he had given to the Society has been misused. The court below after evaluating the evidence found the version given by the accused more probable when

compared to the evidence adduced by the complainant.

As rightly pointed out by the learned counsel for the respondent, the conclusion drawn by the court below has been arrived at after appreciation of the evidence in the case and it could not be said on a scrutiny of the evidence that the said view is a perverse one. It is a possible view. If that be so, as settled by law, this Court will not be justified in interfering with the order of acquittal. For the above reasons, this appeal fails and it is accordingly dismissed.

P. BHAVADASAN,
JUDGE

sb.